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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SUMMIT CARBON SOLUTIONS LLC, Petitioner, vs. IOWA UTILITIES BOARD, Respondent, and SIERRA CLUB IOWA CHAPTER, and OFFICE OF CONSUMER ADVOCATE, Intervenors.	)	No. CVCV062900 SIERRA CLUB'S POST-TRIAL BRIEF

Comes now Sierra Club Iowa Chapter and hereby submits the following Post-Trial Brief in this case:

INTRODUCTION

This case arises from a request by Sierra Club to the Iowa Utilities Board (IUB) pursuant to the Iowa Open Records Law, Chapter 22 of the Iowa Code. Sierra Club requested the list of landowners to whom Summit Carbon Solutions (Summit) sent notices of informational meetings because those landowners are likely impacted by Summit's proposed carbon dioxide pipeline. There is no dispute that the landowner list is a public record within the ambit of Chapter 22. The list was provided to the IUB by Summit. Summit, in this action, argues that the list is exempt from the requirements of Chapter 22 because it allegedly falls within the exception set out in Iowa Code § 22.7(18).

Section 22.7(18) provides that a record submitted to a government body is exempt from release only if it was not required by law, rule, procedure or contract to be submitted to the agency. After a hearing on Summit's motion for temporary injunction, the Court issued a Ruling granting the injunction. Based on the Court's Ruling, the only issue for trial was whether submission of the landowner list to the IUB was required by a procedure of the IUB.

LEGAL STANDARDS RELATED TO OPEN RECORDS CASES

The Iowa Open Records Law is codified as Chapter 22 of the Iowa Code. Pursuant to Iowa Code § 22.1(3)(a), a public record is any record or document in the possession of a government body. A landowner list in the possession of a government body is a public record. *Ripperger v. Ia. Pub. Info. Bd.*, 967 N.W.2d 540 (Iowa 2021). The Iowa Supreme Court has explained the purpose of the Open Records Law as follows:

> The purpose of [Chapter 22] is 'to open the doors of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.'" *Diercks*, 806 N.W.2d at 652 . . . . "There is a presumption in favor of disclosure" and "a liberal policy in favor of access to public records." *Hall v. Broadlawns Med. Ctr.*, 811 N.W.2d 478, 485 (Iowa 2012). "Disclosure is the rule, and one seeking the protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability." *Diercks*, 806 N.W.2d at 652 (quoting *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999).

Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 229 (Iowa 2019).

And the exemptions must be interpreted narrowly, *Id.,* as long as the intent of the exemption is effectuated, *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 897 (Iowa 1988).

ARGUMENT

Based on the Court's Rulings on Summit's Motion for Temporary Injunction and Sierra Club's Motion for Summary Judgment, the only issue at trial was whether the landowner list that was the subject of Sierra Club's open records request was required to be submitted to the IUB pursuant to a procedure of the IUB. In this case, the IUB, apparently through its staff, requested that Summit submit the landowner list to the IUB. But when does a request become a requirement? Iowa courts have interpreted a request by a government agency to be a requirement when the request is made in the course of the agency's statutory duties. See, e.g., *Lamar Co. v. City of Des Moines*, No. 21-0550 (Ia. App., June 29, 2022); *State v. Bakke*, No. 21-0496 (Ia. App., June 29, 2022.

The facts in this case show that submission of the landowner list was required by the IUB. The IUB's December 16, 2021 Order makes clear that the landowner list is an important aspect of the IUB's duty to consider applications for hazardous liquid pipeline permits. As the Order says, the landowner list "is an important document that allows the Board to determine whether there are conflicts of interest with the proposed pipeline and whether proper notice has been provided to landowners in the corridor." This allows the IUB to carry out its duties under Iowa Code § 479B.4, to conduct informational meetings and give notice to landowners who may be impacted by the pipeline. Clearly, therefore, the request for the landowner list was made in the course of the agency's statutory duties and is therefore required to be submitted to the IUB.

The testimony of OCA attorney Jennifer Johnson further confirms this fact. Ms. Johnson testified from her experience as an attorney for the OCA and for the IUB that permit applicants would sometimes approach IUB staff and ask about what might be

required in processing the application (T. Tr. I, p. 6). Ms. Johnson further testified that in her experience IUB staff never asked for information it did not need (T. Tr. I, p. 8). Ms. Johnson could not recall any time when a permit applicant did not provide the information that staff requested at an initial interview (T. Tr. I, p. 9). Ms. Johnson stated:

> It's my experience that when a company comes in and asks for a meeting and tries to facilitate the procedure that they're seeking and the approval that they're seeking, or trying to expedite that process, they want to provide whatever will make that happen faster.

(T. Tr. I p. 9).

In cross-examination by Sierra Club counsel, the following testimony was presented:

> Q. During your time at the IUB, it's my understanding, from what you said in your direct testimony, that it was a common practice or procedure for the board or board staff to ask for information from applicants for a permit or certificate; is that correct?
>
> A. If the board or board staff specifically was asked, board staff would respond and say those items that they would need to facilitate whatever it was that the company was looking to obtain from the board.
>
> Q. And is it fair to say that that was treated as something that had to be submitted in order for the process to proceed?
>
> A. Yes. I mean, those meetings would be considered informal, at least from board staff's perspective. That information that the board staff was seeking should be submitted in order to facilitate the process.
>
> Q. So even though not written down or not formal, it was a requirement in order for the process to proceed? Is that a fair statement?
>
> A. Generally speaking, that's a fair statement.

(T. Tr. I, p. 9-10).

On cross-examination by IUB counsel, Ms. Johnson said that when IUB staff would request information, the IUB would enforce that requirement through issuance of an order (T. Tr. I, p. 13). On further cross-examination by Sierra Club counsel Ms. Johnson said that if the information requested by IUB staff was something important to the process, it would be required (T. Tr. I, p. 15). Finally, in response to Summit's attorney, Ms. Johnson said that she did not believe IUB staff ever requested information that was beyond the scope of the IUB's jurisdiction (T. Tr. I, p. 16).

Summarizing, Ms. Johnson's testimony clearly establishes that requests for information by IUB staff to permit applicants was considered to be a requirement, to the point that if the information was not provided, the IUB would issue an order enforcing the requirement. Summit has presented no evidence nor pointed to anything in the record to carry its burden of showing that the landowner list in this case was not required. Furthermore, as shown below, if a request from the IUB was not complied with, the IUB could issue an order forcing the company to comply. That clearly makes the request a requirement.

The only remaining issue is whether the IUB had a procedure for requesting landowner information in hazardous liquid pipeline cases when it requested the information from Summit. In support of an affirmative answer to that question, Sierra Club has presented two documents: The IUB's Order issued on December 16, 2021, and the IUB's Answer to Interrogatory No. 2 propounded by Sierra Club. Sierra Club has also presented the testimony of Geri Huser, Chair of the IUB.

The December 16 Order states that a hazardous liquid pipeline company is required to give notice to all landowners and persons in possession of land in a corridor where the proposed pipeline will be located. The Order also states that the landowner list is an important document for the IUB to carry out its duties. The Order concludes, "The Board **therefore** requires pipeline companies to file a mailing list . . ." (emphasis added). Although the Order uses the present tense to explain the importance of the list, the list didn't just become important after Summit submitted its list. The list has always been important because the requirements of Iowa Code § 479B.4 have been in the law for quite some time. Use of the present tense does not mean that the list just now became important. So when the Order uses the present tense to reach the conclusion that "therefore" the IUB requires the list to be filed, in conjunction with using the present tense to explain the importance of the list, that context clearly demonstrates that the requirement that the list be provided did not just arise. The Order also indicates that it is a clarification of existing policy, not a new policy created by that Order.

The IUB's Answer to Sierra Club's Interrogatory No. 2 is even more explicit. That answer clearly says that the IUB has had a routine practice since June of 2019 of requesting landowner information. As explained above, a request by the IUB or IUB staff must be interpreted as a requirement. And a routine practice is a procedure. According to Merriam-Webster's Collegiate Dictionary (10th Edition), a practice is a repeated or customary action or a usual way of doing something. And a procedure is a particular way of accomplishing something or an established way of doing things. The similarity of these definitions is obvious.

Furthermore, the Court acknowledged in its Ruling on Sierra Club's Motion for Summary Judgment that the procedure contemplated by § 22.7(18) need not be in writing. Nor does the IUB have to request a landowner list in every case. Summit and the IUB argued in resistance to Sierra Club's Motion for Summary Judgment that the IUB did not request a landowner list in every case where a permit was requested for various types of utility infrastructure. As Jennifer Johnson testified, information was requested if IUB staff felt the information was necessary to carry out the IUB's statutory duties. But there was still a procedure for making such a request and for the applicant to provide the information when requested.

The Iowa cases that have interpreted § 22.7(18) have been one-time situations, such as the hiring of a city manager, *City of Sioux City v. Greater Sioux City Press Club*, supra; investigation of a school principal, *Des Moines Indpendent School Dist. v. Des Moines Register and Tribune Co.,* 487 N.W.2d 666 (Iowa 1992); and a list of property owners, *Polk County Assessor Randy Ripperger v. Ia. Pub. Info. Bd.*, 967 N.W.2d 540 (Iowa 2021). It is clear from the record that submission of landowner lists in public utility cases is a recurring situation and the IUB's procedure for obtaining those lists is to request them when needed. So it is not surprising that landowner lists are not required in every case.

Geri Huser, in her testimony, was clearly trying to avoid answering questions directly, but a review of her testimony supports Sierra Club's position. Ms. Huser acknowledged that a request by the IUB for the landowner list would be made to assist the IUB in doing its work (T. Tr. II, p. 8-9). Ms. Huser was asked about the statement in

the Answer to Interrogatory No. 2 of Sierra Club's interrogatories to the IUB, in which it was stated that the IUB has had a routine practice of requesting landowner information. She said that a routine practice means that it is done some of the time (T. Tr. II, p. 9). She later clarified this response as follows:

> A. . . . Prior to the date of this [December 16, 2021] order, there was nothing in writing that set out that procedure. There were statutory requirements. And there has been a development of a process that is not in writing, from the point that we required the companies to provide us with notice of the informational meeting request.
>
> Q. So there was a process even before December 16, it just wasn't in writing; is that correct?
>
> A. Yes.

(T. Tr. II, p. 16).

So Ms. Huser acknowledged that there had been a procedure before December 16, 2021, for requesting information from pipeline companies, including landowner lists, although the procedure was unwritten. But the procedure referred to in § 22.7(18) does not have to be in writing.

Ms. Huser also agreed that if a request was made to a company to provide information and the information was not provided, the IUB could or would issue an order requiring the information to be provided (T. Tr. II, p. 10-11). Cross-examination by Summit's counsel appears to have been trying to make the argument that because not every pipeline project was required to submit a landowner list, there was no procedure for submitting those lists. But as explained above, a procedure as contemplated in § 22.7(18) does not mean that the information is requested in every case.

As noted above, Summit's burden is to prove that the exemption from the Open Records Law applies in this case. It is not Sierra Club's burden to prove that the exemption does not apply. In addressing that issue, the Court should consider the legislative intent in creating that exception. As stated in *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 898, (Iowa 1988), "It is the legislative goal to permit public agencies to keep confidential a broad category of useful incoming communications which might not be forthcoming if subject to public disclosure." In this case there has been absolutely no proof that Summit or any other applicant for a permit from the IUB would be reluctant to submit the information to the IUB if it were going to be subject to the Open Records Law. To the contrary, the testimony of Jenifer Johnson and Geri Huser confirm that generally when the information is requested by the IUB from the applicant, the information is provided.

Although Summit requested that the IUB provide confidentiality for the landowner list, neither Summit nor the IUB have presented any proof that the denial of that request would have dissuaded Summit from providing the information. As explained in Sierra Club's Resistance to Summit's Motion for Temporary Injunction, Summit's motive in resisting disclosure of the landowner list is to prevent the landowners from communicating with each other and joining in responding to Summit's propaganda and harassment. So even if § 22.7(18) applied here (which it does not), the records custodian (the IUB) could not reasonably believe that Summit would not submit the landowner list if the list might be released to the public. Cf., *Polk County Assessor Randy Ripperger v. Ia. Pub. Info. Bd.*, 967 N.W.2d 540 (Iowa 2021). And it is the records custodian's decision

as to whether the information would be provided if it might be disclosed. *Id*. In that regard, the IUB's December 16, 2021 Order clearly shows that the IUB believes that the information should be provided and that it will therefore be subject to public release pursuant to § 22.7(18).

CONCLUSION

The Iowa Open Records Law unambiguously requires production of public records, subject only to the specific exemptions listed in § 22.7. In seeking to prevent disclosure of the landowner list in this case, Summit and the IUB are relying on word games and tortured interpretations of terms. But they have presented no evidence to carry their burden of proof to show that the exemption in § 22.7(18) applies. Instead, a review of the evidence in this case shows the following:

- The landowner list is a public record.
- The IUB requested that Summit submit the landowner list to the IUB.
- That request was a requirement that could be enforced by an order from the IUB.
- That request was pursuant to a procedure of the IUB.
- The IUB had no reason to believe the information would not be provided if it would be released to the public.

Throughout this proceeding Summit and the IUB have subtly attempted to shift the burden of proof to Sierra Club to prove that § 22.7(18) does not apply. But it is the burden of the party relying on the exemption to prove that it does apply. The Court must keep this burden in mind in deciding this case. Summit and the IUB appear to be relying

solely on the argument that landowner lists may not have been requested in every case. That does not mean there is no procedure. The procedure is that when the information is requested in order for the IUB to carry out its duties, it is expected to be submitted and that request can be enforced by an order. Sumit and the IUB have not presented any evidence that the procedure referred to in § 22.7(18) means that a request must be made in every case.

It is also important for the Court to remember that it is important for the landowner list to be made public so the landowners can communicate with each other and support each other in the face of harassment and intimidation by Summit and its agents. Examples of Summit's actions were presented as Exhibits 2, 3 and 4 with Sierra Club's Resistance to Summit's Motion for Temporary Injunction. Neither Summit nor the IUB have presented any evidence that the landowners want their information to remain confidential.

Based on the foregoing, the Court should deny Summit's request for an injunction and the Court should hold that the landowner list is a public record that is not exempt pursuant to § 22.7(18).

/s/ *Wallace L. Taylor*

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